No. 12,889

IN THE

United States Court of Appeals

For the Ninth Circuit

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LTD. (a corporation),

Appellant,

vs.

VIKING AUTOMATIC SPRINKLER COMPANY (a corporation),

Appellee.

Appeal from the United States District Court, Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING BASIS OF COURTS' JURISDICTION.

This is an appeal from a judgment or decree, as it was called, entered in the United States District Court, Northern District of California, Southern Division, on the 30th day of January, 1951, dismissing appellant's complaint.

The District Court had jurisdiction of the cause under the provisions of Title 28 U.S.C.A., Section 1332-2.

The United States Court of Appeals for the Ninth Circuit has jurisdiction upon appeal to review the judgment of the District Court below under the provisions of Title 28 U.S.C.A., Section 1291.

STATEMENT OF THE CASE.

The printed record on appeal consists of the pleadings and formal documents (page 3-page 24); the opening statements of counsel (page 26-page 55); certain stipulations, receiving of documents in evidence, and questions propounded to the witness Johnson (page 55-page 80); defendant's motion to dismiss together with arguments of counsel and discussions with the Court (page 80-page 131). The case was tried by the Court sitting with a jury. At the conclusion of the appellant's case the appellee moved to dismiss (R. 80), which motion was granted (R. 129).

The appellant, a corporation organized under the laws of Great Britain, was authorized to conduct an insurance business in California and had issued a comprehensive liability insurance policy to the Austin Company. The Austin Company being engaged in the construction business had a contract to erect certain buildings for the City and County of San Francisco at the Mills Field Air Port. The Austin Company engaged the appellee, Viking Company, as a subcontractor to install a sprinkling system in these buildings. The contract was in writing and is set forth beginning at R. 56.

Two workmen, named Estrada and Taylor, who were employees of the Viking Company, while working on the job at Mills Field and within the course of their employment were injured solely as a result of the negligence of the Austin Company. (R. 28, 73.) Estrada obtained a judgment against the Austin Company in a State Court in California for $12,500. Taylor's claim was settled. The appellant pursuant to its policy of public liability insurance and on behalf of its assured the Austin Company paid Estrada the amount of the judgment, made the settlement with Taylor, and paid other sums for attorneys' fees and expenses. The total amount of all of these payments amounted to $19,458.24. These facts were stipulated and agreed to. (R. 72.) That they were reasonable was not questioned. (R. 73.)

Appellant being subrogated to the rights of its assured, the Austin Company, sought by this action to recover against the Viking Company for the sums it had expended under the indemnity agreement which was incorporated in the contract between Austin Company and Viking Company. That agreement was set forth in part in the complaint (R. 5), and appears in the main contract, Appellant's Exhibit No. 1 (R. 58). It is also set forth in this brief, infra, p. 5.

The evidence in this case was practically all received by stipulation. (R. 55-77.) After the main contract and certain other exhibits were received in evidence and the stipulation of facts made, appellant, realizing that the indemnity provision of the contract was am-

biguous, attempted to clear up the latent ambiguity in order to show the true intent of the parties by calling the witness Samuel A. Johnson to develop certain facts. Upon objections made by appellee, appellant was prevented from presenting evidence to explain the latent ambiguity and upon motion made by the appellant (apparently under Rule 41, F. R. C. P.) the Court took the case away from the jury and dismissed the action.

QUESTIONS INVOLVED.

1. Where an action is brought on a contract containing a latent ambiguity, should not the plaintiff be allowed to introduce all the material evidence that would explain the ambiguity?

2. Is it not reversible error for the trial Court to refuse to allow plaintiff to introduce such evidence and order a dismissal of the action?

SPECIFICATION OF ERRORS.

The appellant specifies as error and intends to urge the following errors were committed by the Court below in dismissing appellant's complaint and entering judgment for appellee.

1. In refusing to allow appellant to question and prove by the witness, Samuel A. Johnson, that the appellee had a contract of public liability insurance

with a contractual endorsement on it that covered the liability sought to be established by appellant. (Record set forth at p. 9, infra.)

2. In taking the case from the jury and dismissing the action.

ARGUMENT.

I.

THE CONTRACT CONTAINED ENFORCEABLE INDEMNITY PROVISIONS INDEMNIFYING AGAINST THE NEGLIGENCE OF THE AUSTIN COMPANY.

The contract of indemnity upon which appellant maintains this action is contained in paragraph 7 and Article XII of the contract between Austin Company and appellee Viking Company. Those provisions read as follows (R. 58):

> "7. Insurance—It is understood and agreed that vendor is fully covered with Public Liability, Workmen's Compensation and Property Damage insurance and agrees to protect and indemnify the Buyer against all claims for damages, lawsuits, etc., which may arise due to difficulties encountered while vendor is servicing this operation."

> "Article XII. Insurance

> Subcontractor shall, during the progress of the work maintain: (a) Workmen's Compensation Insurance for all of its employees employed at the site of the work, or if such insurance is not required by the laws of the state wherein the

work is to be performed, Employer's Liability Insurance; (b) Contractor's Public Liability Insurance; and (c) Automobile Liability Insurance.

The limits of liability provided in Subcontractor's Public Liability Insurance Policy shall be $100,000.00 for injuries, including accidental death, to any one person, and subject to the same limit for each person, $200,000.00 for any one accident involving two or more persons. Such policy shall also provide for property damage liability of $10,000.00 for any one accident and subject to the same limit total aggregate liability of $50,000.00. The limits provided in Subcontractor's Automobile Liability Insurance Policy shall be $100,000.00 for injuries including accidental death, to any one person, or subject to the same limit for each person, $200,000.00 for any one accident involving two or more persons. Such policy shall also provide a property damage limit of $10,000.00, covering all owned and rented equipment which is used in or on the work.

Should any part of this Contract be sublet, Subcontractor shall, in addition to the foregoing types of insurance, maintain Contractor's Protective Liability Insurance in the amount of $100,000.00 for injuries, including accidental death, to any one person, and subject to the same limit for each person, $200,000.00 for any one accident involving two or more persons, except that Contractor's Protective Liability Insurance need not be maintained to the extent that its Subcontractor maintains Workmen's Compensation, Employer's Liability Insurance and Contractor's Public Liability Insurance, and Automobile

> Liability Insurance, as above set forth, and provided Contractor is named as an additional insured in such policies of insurance. Certificates of all such insurance shall be furnished to Contractor."

Under the substantive law of the State of California, which the Federal Courts will apply, *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, a contract to indemnify the indemnitee against his own negligence is not against public policy, and is enforceable in a court of law. Attention is respectfully directed to the cases of *Southern Pac. C. v. Fellows,* 22 C.A. (2d) 87, 71 Pac. (2d) 75, and *Pacific I. Co. v. California etc. Ltd.,* 29 C.A. (2d) 260, 84 Pac. (2d) 313. The opinions in those two decisions are too lengthy to quote *in extenso* and excerpts therefrom would hardly suffice, therefore we respectfully urge the Court to peruse the opinions themselves.

II.

THE CONTRACT WAS AMBIGUOUS AND REQUIRED THE RECEIVING OF EVIDENCE IN ORDER TO CLARIFY IT AND DETERMINE THE INTENT OF THE PARTIES.

Prior to the time this action was at issue appellee moved to dismiss the complaint under F.R.C.P. 12d. (R. 9.) The matter was heard before the late Honorable Herbert W. Erskine who filed a memorandum order. (R. 10.) For convenience we will set forth Judge Erskine's order:

"Order

As in the case of Pacific Indemnity Co. v. California Electric Works, Ltd., 29 Cal. App. (2d) 260, there appears to be a latent ambiguity in the contract provisions in issue here, requiring the taking of testimony to explain what the parties meant by said provisions and to determine whether the contract was intended to indemnify the plaintiff against its own negligence. Defendant's motion to dismiss is therefore denied.

Dated: July 24th, 1950.

/s/ Herbert W. Erskine,
U. S. District Judge."

After the appellant had proved the relationship of the parties, the existence of the contract, the injury to the workmen and amount paid to them pursuant to its policy of insurance, it called the witness Samuel A. Johnson to explain the latent ambiguity in this indemnity agreement that was recognized and referred to by Judge Erskine in his order above set forth. Appellant attempted to show a policy of public liability insurance carried by appellee with a contractual endorsement thereon that covered the precise liability contended for and contemplated by paragraph 7 and Article XII above set forth.

This the Court refused appellant the right to do and made a ruling that the same was immaterial. In accordance with Rule 20(D) of this Court we will set forth the portions of the record showing the offer, the objection and the ruling of the trial Court concerning the proffered evidence.

"By Mr. Healy. Q. Are you connected with the defendant Viking Company?

A. Yes, sir.

Q. In what capacity?

A. I am an employee, an engineer.

Q. Are you an officer?

A. No, sir.

Q. Are you a manager?

A. Only insofar as I handle things when the manager isn't here.

Q. I will just ask you this: Are you famliiar with this (40) contract that is here in evidence between the Viking Company and the Austin Company?

A. Yes.

Q. And you are familiar with this paragraph 7 that we have discussed?

A. Yes.

Q. I was going to ask you whether or not pursuant to the terms of that contract, your company did in fact take out public liability insurance.

Mr. Boyd. If Your Honor please, that is entirely immaterial. Objected to on that basis; no issue as to whether there is any insurance of any kind as far as its intent was concerned.

Mr. Healy. May I be heard?

The Court. I don't quite see the materiality whether they took it out or not. Their insurance company is not being sued; they are being sued.

Mr. Healy. That is right. But may I read the provision to Your Honor? It says:

> 'It is understood and agreed that vendor is fully covered with public liability, workmen's compensation and property damage insurance.'

It is right on the first page, right down by 7; right down in this corner of the green one. It is more legible.

The Court. All right; I have it. (41)

Mr. Healy. I intend to show—I think I can show that—that that intent seems to be an essential ingredient, says Mr. Boyd—that they did in fact take out this type of insurance, and not alone that, but they had a contractual endorsement on it, so that they were well insured. If I can prove that, it would have probative value.

Mr. Boyd. If Your Honor please——

Mr. Healy. ——that they did cover this type of situation. So I think it is very material and has considerable probative value.

Mr. Boyd. If Your Honor please, there are no allegations pertaining to insurance, compensation or any other kind in this action; it is entirely immaterial. The only question that is alleged in the complaint and the only one that has been mentioned, is whether or not the agreement that has been entered into was in effect a hold-harmless agreement protecting not the insurance company, but the insured, the Austin Company, for the——

The Court. I am inclined to think that that might not be admissible, because of the fact that one might take out a public liability insurance policy to protect one against something that one might not be liable for. That sometimes happens.

Mr. Healy. Yes, but if they had a contractual endorsement on it, wouldn't it have a probative value that they realized (42) that they were exposing themselves by this contract to a contrac-

tual liability as distinguished from a tortuous liability and paid an extra premium for it?

The Court. It might be competent if the defendant were to offer some evidence by way of rebuttal, or offer evidence on their part to that effect.

Mr. Healy. Very well.

The Court. But I don't think at this stage of the case it would be admissible?

Mr. Healy. Very well, Your Honor. With that in mind I will withdraw my question. You may step down." (R. 77-80.)

* * * * * * *

"The Court. Of course, if that were necessary to be raised as a part of the affirmative burden of proof, then the Court should permit at this time the question that Mr. Healy asked of Mr. Johnson to be answered, if it is a part of the affirmative burden.

Mr. Boyd. I don't think that insofar as whether or not Mr. Johnson carries insurance would in any way affect in any way the meaning or interpretation——

The Court. If the plaintiff has the burden of showing the true intent of the parties, and as you have just said, he has not carried that burden, then he would have the right if (51) he could show it, if there is any evidenciary matter that might be corroborative of the intent of the defendant.

Mr. Boyd. I agree one hundred per cent that if he has any evidence that would tend to interpret or set forth the intent of the Austin Company to cover this particular situation—any evidence that he has—he not only has the right, as

I see it, Your Honor, but also the duty to come forward with his evidence and show what the intent was.

The Court. But you objected to the question that he asked along that line.

Mr. Boyd. That was on the question of insurance.

The Court. Yes, but it was his contention that the fact that the defendant may have taken out insurance to cover the kind of liability that is referred to in paragraph 7 of the agreement might be evidenciary in character as to the intent with which the language in paragraph 7 was used." (R. 87-88.)

* * * * * * *

"Mr. Healy. We ask permission to question the man along those lines." (R. 125.)

* * * * * * *

"Mr. Healy. I ask permission to question that man upon his policy. I think you can take that outside of the presence of the Jury.

The Court. To save your record in the matter, I will hold that that is immaterial, and I will sustain the objection to that testimony as to the purpose for which it is sought.

Mr. Healy. It will be understood that I have asked the question clearly, we all understand the force of it, and it was argued.

The Court. It will be understood that you have asked the same question again that you asked previously, and that I sustained the objection on the ground that that is immaterial to the resolution of this question.

Mr. Healy. Very well." (R. 129.)

In suing on a contract that is ambiguous a party has a right and a duty to present all the facts and circumstances surrounding the transactions to enable the Court to properly interpret the instrument. The rule is well expressed in 17 *C.J.S.* 1242 where it is said:

> "If a written contract is ambiguous or obscure in its terms, so that the contractual intention of the parties cannot be understood from a mere inspection of the instrument, extrinsic evidence of the subject matter of the contract of the relations of the parties to each other, and of the facts and circumstances surrounding them when they entered into the contract may be received to enable the Court to make a proper interpretation of the instrument."

III.

THAT APPELLEE HAD INSURED AGAINST THE VERY LIABILITY SOUGHT TO BE ESTABLISHED WAS IMMATERIAL.

It has been recognized many times by the Appellate Courts in California that the carrying of insurance has great evidentiary value in determining what the true intent of the parties may be. This rule has been applied in a number of different situations. The rule and the reason behind it is well expressed in the case of *Perry v. Paladini, Inc.*, 89 Cal. App. 275, 264 Pac. 580, where the Court said:

> "Defendant had denied that it was the owner of the truck and had denied knowing anything

about an insurance policy, and this testimony had been given by the president, Alex Paladini. It was competent to show every act of ownership on the part of defendant or its officers, and if results flowed therefrom not anticipated this is appellant's misfortune brought about by its own misconduct. It has been a well-established principle of law for many centuries that upon a trial for a particular crime evidence which shows or tends to show the commission of another and distinct crime by a defendant is inadmissible, and it is prejudicial error to let it go before the jury. This rule has its exceptions, and where it appears that evidence of the commission of such other crime has a direct and logical bearing upon the guilt of the accused as to the crime with which he is on trial evidence of the commission of such other offense is admissible (*People v. Argentos,* 156 Cal. 725 (106 Pac. 65)). By analogy the rule as to the instant case should be that while it is improper and highly prejudicial to allow evidence to be introduced showing a defendant is insured against liability in case of accident, yet evidence of general insurance of certain property by a defendant who denies ownership does have a direct and logical bearing upon that particular question and is therefore admissible. The plaintiff could have gone much further than he did. He would have been permitted upon his insistence to offer in evidence the application for insurance if the same had been executed by defendant or any of its authorized officers. Plaintiff, mindful of the defendant's claim of error, went no further than to show the fact of insurance. *Ordinarily, men do not insure*

the property of others; and, likewise, insurance companies do not usually issue policies covering property to one having no interest therein. And going still further, insurance companies do not roam around the byways issuing policies at their own instance and without the application of anyone.'' (Italics ours.)

See, also:

Burlingham v. Gray, 22 C. (2d) 87, 137 Pac. (2d) 9;

Mullanix v. Basich, 67 C.A. (2d) 675, 155 P. (2d) 130;

Curcic v. Nelson Display, 19 C.A. (2d) 46, 64 P. (2d) 1153.

The Court should have received evidence of the existence of the contractual rider or endorsement to cover the liability contended for.

IV.

ON A MOTION TO DISMISS THE COURT MUST VIEW THE EVIDENCE MOST FAVORABLY TO THE PLAINTIFF (APPELLANT).

A reading of the main contract between Viking Company and appellant (R. 56) will demonstrate that Viking Company was not the agent of appellant in any sense of the word, but was an independent contractor. In certain instances it was provided that the contractor should be named as an additional insured in such policies of insurance. In all instances

certificates of such insurance were to be furnished to the contractor. (Article XII of contract, R. 62.)

Save with few exceptions such as where there is a nondelegable duty to the public or where work is inherently dangerous it is elementary that a contractor cannot be held responsible for the tortuous activities of a subcontractor. Why would the parties specifically provide for public liability insurance to cover the liability of the subcontractor? The contractor (Austin Company) could not be liable for the ordinary torts of the Viking Company. The purpose in setting forth such an elaborate scheme for insurance as is contained in Article XII together with the contractual rider that was placed thereon (which the appellant offered to prove and the Court held to be immaterial) demonstrates that the parties intended that appellee had bound itself to indemnify the Austin Company against the latter's own negligence. This was a cost-plus, a fee contract. (R. 59.) To provide insurance in the high limits required by Article XII was costly to say the least. That cost was ultimately borne by the Austin Company. It is inconsistent with good business practice and altogether illogical to have required the carrying of such insurance if the same were meaningless. As above indicated vicarious liability for tortuous conduct by Viking Company could not be imposed on Austin Company. Therefore without the existence of the contractual rider that appellant offered to prove the conduct of the parties becomes meaningless. However, if allowed to prove the

existence of the contractual rider or endorsement the intent of the parties as expressed in paragraph 7 and Article XII, at once becomes apparent. If allowed to prove the existence of the endorsement the "latent ambiguity" spoken of by Judge Erskine in his order above set forth, disappears and the appellant would have proved its case.

At one stage of the proceeding the learned trial Court apparently agreed with this view, but later decided to take the case away from the jury on the sheer grounds that the contract was unfair.

> "The Court. Of course, if that were necessary to be raised as a part of the affirmative burden of proof, then the Court should permit at this time the question that Mr. Healy asked of Mr. Johnson to be answered, if it is a part of the affirmative burden.
>
> Mr. Boyd. I don't think that insofar as whether or not Mr. Johnson carries insurance would in any way affect in any way the meaning or interpretation——
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> Mr. Boyd. I agree one hundred per cent that if he has any evidence that would tend to interpret or set forth the intent of the Austin Company to cover this particular situation—any evidence that he has—he not only has the right, as

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The Court. But you objected to the question that he asked along that line.

Mr. Boyd. That was on the question of insurance.

The Court. Yes, but it was his contention that the fact that the defendant may have taken out insurance to cover the kind of liability that is referred to in paragraph 7 of the agreement might be evidenciary in character as to the intent with which the language in paragraph 7 was used." (R. 87-88.)

It is of course elementary that when considering a motion for a dismissal under Section 41, F.R.C.P., the Court must view the evidence most favorably toward the plaintiff and indulge in every legitimate inference that can be drawn from the evidence. Only when after disregarding conflicts in the evidence it comes to a conclusion that there is no substantial evidence to support a judgment can such a motion be granted. Although the cases are legion to this effect in both the Federal and State Courts, we will refer to only the following:

Gunning v. Cooley, 281 U.S. 90, 50 S. Ct. 231, 74 L. Ed. 720;

Shaw v. Missouri Pac. Ry. Co., 36 F. Supp. 651;

Slocum v. N. Y. Life Ins. Co., 228 U.S. 364, 33 S. Ct. 523, 57 L. Ed. 879;

Ohlinger's Federal Practice, Vol. 3A, p. 48.

V.

CONCLUSION.

It is respectfully submitted that the Court erred in refusing to allow appellant to question and prove by the witness Johnson that appellee had a contract of public liability insurance with a contractual endorsement; and that the Court erred in taking the case from the jury and dismissing the action. Reversible error having been committed the judgment should be reversed and a new trial granted.

Dated, San Francisco, California,
July 2, 1951.

Respectfully submitted,
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